IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 703

JACK ALLEN BARBER,

Petitioner,

v.

RAY H. PAGE, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

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Opinions Below

The opinion of the District Court of Tulsa County, Oklahoma was not reported. The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported in 388 P.2d 320 (A. 28-41). The opinions of the United States Court of Appeals for the Tenth Circuit are reported at 355 F.2d 171 (1966), and 381 F.2d 479 (1966) (A. 60-63), respectively.

Jurisdiction

The last judgment of the Court of Appeals was entered December 30, 1966 (A. 63). Rehearing was denied March 24, 1967. The date of filing the Petition for Writ of Certiorari was April 24, 1967. *Certiorari* was granted October 9, 1967. The time for filing this brief was extended to January 15, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Applicable Constitutional Provisions and Statutes

(1) The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

(2) 28 U.S.C., Section 2241(c)(1):

> "Writ of Habeas Corpus is available to a prisoner of a state institution who is in custody in violation of the Constitution of the United States."

Questions Presented

Was Petitioner unconstitutionally denied his right to be confronted by a witness against him and his right to have effective assistance of counsel?

Statement of the Case

Petitioner was convicted of robbery with firearms in the District Court of Tulsa County, Oklahoma. At a preliminary hearing on August 22, 1961 (A. 33) one Woods, who was jointly charged with Petitioner, testified inculpating Petitioner. At the preliminary hearing, an attorney named Parks was retained to represent both Petitioner and Woods. Woods was called to the stand. Parks advised Woods of his right to claim the privilege against self-incrimination. Prior to Woods' testimony (*Barber* v. *Page*, 355 F.2d 171), after a recess, Parks requested, and was granted, leave to withdraw as attorney for Woods. In the presence of Petitioner and Parks, Woods testified incriminating Petitioner. Woods was not cross-examined by Parks but was represented by a different attorney for another jointly accused (A. 61).[1]

The information charging Petitioner and his co-defendants is dated August 25, 1961 (A. 33). After trial, on March 19, 1962, Petitioner was sentenced to a term of 15

[1] The opinion of the Court of Criminal Appeals of Oklahoma in *Barber* v. *Oklahoma*, 388 P.2d 320, recites that the attorney for Petitioner cross-examined Woods during the course of the preliminary hearing. This did not occur, as the State conceded before the Court of Appeals for the Tenth Circuit. *Barber* v. *Page*, 355 F.2d 171, at 172.

years. Significantly, although Parks was granted leave to withdraw as counsel for Woods during the preliminary hearing, Parks appeared for Woods in three criminal cases in the United States District Court for the Northern District of Oklahoma, on September 14, 1961, October 5, 1961, and October 6, 1961. This fact was not brought to the attention of the United States Court of Appeals for the Tenth Circuit. There is attached as an Appendix to this brief, a copy of a letter to Petitioner dated September 6, 1967, from the Clerk of the United States District Court for the Northern District of Oklahoma, setting forth the representation of Charles Henry Woods by the attorney Parks on three dates subsequent to Parks' purported withdrawal as counsel for Woods at the preliminary hearing.[2]

At the trial, over Petitioner's objections, a transcript of Woods' testimony at the preliminary hearing was received in evidence (A. 61). Woods was not present at the trial. He was an inmate of a federal penal institution (A. 61; A. 35). The state made no effort to return Woods for the trial (A. 35). The state trial court determined that the state had no duty so to do. The Oklahoma Court of Criminal Appeals affirmed. *Barber* v. *Oklahoma,* 388 P.2d 320 (1963) decided prior to the opinion of this Court in *Pointer* v. *Texas, supra.* (See *Barber* v. *Page,* 355 F.2d 171, at 172.)

Petitioner sought Habeas Corpus in the United States District Court for the Eastern District of Oklahoma. (The Petition was designated "Application for Writ of Error Coram Nobis".) The Petition was denied. The United States Court of Appeals for the Tenth Circuit set aside

[2] Petitioner requests this Court in its supervisory capacity over United States courts to take notice of the contents of the Appendix.

the judgment below and remanded for a determination as to whether or not Petitioner had exhausted his state remedies (A. 3). *Barber* v. *Page,* 355 F.2d 171. On remand, the District Court determined that state remedies had been exhausted (A. 7-8). The Court of Appeals for the Tenth Circuit affirmed, holding that the state was not required to ask a federal court to grant a Writ of Habeas Corpus *ad testificandum* and have its application denied prior to using the transcript of the testimony at the preliminary hearing (A. 60-62 at p. 61). Judge Aldrich dissented (A. 62-63).

ARGUMENT

I.

The Right of Confrontation Provided in the Sixth Amendment Is the Right to Be Confronted Before the Trier of the Facts.

In *Pointer* v. *Texas,* 380 U.S. 400 (1965), the Court held that the privilege of confrontation guaranteed by the Sixth Amendment, and made applicable to the states by the Fourteenth Amendment, was not discharged, and could not be discharged by the use of a transcript of the preliminary hearing, at which petitioner had no lawyer and, therefore, had no opportunity to cross-examine the principal witness against him, who, since the time of the preliminary hearing, had left the state.[3]

On the same day as *Pointer* v. *Texas, supra,* was decided, the Court decided *Douglas* v. *Alabama,* 380 U.S. 415 (1965)

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[3] See *Burgett* v. *Texas,* #53 OT 1967, decided November 13, 1967, —— U.S. ——, 36 USLW 4014.

in which it quoted the following from *Mattox* v. *United States,* 156 U.S. 237, 242-3 (1895):

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony whether he is worthy of belief."

In *Parker* v. *Gladden,* 385 U.S. 363 (1966), the Court said:

> "As we said in Turner v. Louisiana, 379 US 466, 472-473, 13 L ed 2d 424, 428, 429, 85 S Ct 546 (1965), the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation of cross-examination and of counsel."

The constitutional guarantee of confrontation is an evidentiary concept, having its genesis in the hearsay rule.[4] Confrontation affords bifurcated advantages: the first is the opportunity of cross-examination; the second is the personal appearance of the witness. Dean Wigmore describes this as: "the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of *a witness' deportment while testifying* and a certain subjective

[4] V *Wigmore on Evidence,* §1397 (3rd ed., 1940).

moral effect is produced upon the witness." (Emphasis in treatise.) V *Wigmore on Evidence,* 3rd ed., 1940, §1395. Dean Wigmore continues:

> "* * * * It is the witness' presence before the *tribunal* that secures this secondary advantage—which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination."

The Constitution itself makes no provision for exceptions to the right of confrontation before the trier of the facts. *Mattox* v. *United States,* 156 U.S. 237 (1895) engrafted upon the constitutional guarantee the concept that the right of confrontation proclaimed by the Sixth Amendment was to be interpreted in light of the rights acquired through Magna Charta.

The interrelationship between the hearsay rule and the constitutional requirement has recently been discussed by the Court of Appeals for the Third Circuit in *Government of Virgin Islands* v. *Aquino,*[5] 378 F.2d 540, 549 (1967) in the following language:

> "The question remains, however, under what circumstances prior testimony of an absent witness who was subject to cross-examination may be introduced into evidence at a trial. The rule has been long settled that this may be done only where the witness is unavail-

[5] At point IV, we shall show that *Virgin Islands* v. *Aquino* is squarely *contra* to this case.

able at the time of the trial because of his death, insanity, illness, absence beyond the jurisdiction, or because he was kept away by the connivance of the other party. The requirement that such unavailability be shown *exists under the constitutional requirement of confrontation and equally so as a rule of evidence,* since the declarant's testimony ordinarily is inadmissible as hearsay and can be admitted at the subsequent trial only out of necessity as an exception to the hearsay rule. See Motes v. United States, 178 U.S. 458, 20 S.Ct. 993 (1900); Washington v. Holman, 245 F. Supp. 116, 122-123 (M.D. Ala. 1964), aff'd on this point, 364 F.2d 618, 622-624 (5 Cir. 1966)." (Emphasis supplied.)

This case is *Pointer* v. *Texas, supra,* with the single exception that instead of no lawyer at the preliminary hearing, a lawyer retained by petitioner (but also by the co-defendant), during the preliminary hearing withdrew as counsel for petitioner's co-defendant, yet failed to cross-examine the co-defendant he had so recently represented, although that co-defendant gave inculpating testimony against petitioner. While not characterizing the failure to cross-examine the witness co-defendant as waiver of the right to cross-examine, the Court of Appeals stated:

> "In the case at bar the accused had retained counsel present at the preliminary hearing and counsel had an opportunity to cross-examine. Failure to exercise the right of cross-examination is no ground for asserting denial of the right of confrontation" (A. 62).

Under the circumstances of this case, Petitioner was not represented by counsel "who had been given a complete

and adequate opportunity to cross-examine" (*Pointer*, at page 407). At the outset, it must be noted that the preliminary hearing preceded the filing of the information (A. 33). The Sixth Amendment places on parallel and equal bases the right to be informed of the charge, the right of confrontation and the right of assistance of counsel.

Furthermore, when he entered the preliminary hearing, whether or not it was "full-fledged" (*Pointer*, at p. 407), Mr. Parks had two clients. An inescapable inference from the circumstances is that at the commencement of the hearing, Mr. Parks expected that neither of his clients would testify against the other.[6] How could he have prepared for the searching cross-examination he undoubtedly would have subjected Woods to at trial after knowing the charges?

In *Virgin Islands* v. *Aquino, supra,* the Court realistically recognized the difference in cross-examination at preliminary hearing from cross-examination at trial, saying (at page 549 of 378 F.2d):

> "At the preliminary hearing, however, the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can once it has crossed that line. The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still

[6] Had Mr. Parks known of Woods' change of heart prior to the preliminary hearing, it is fair to assume he would have withdrawn before the hearing commenced.

in doubt. The cross-examiner therefore is in a far different position than he would be at trial, where the government must go beyond its prima facie case to convince the jury of the defendant's guilty beyond a reasonable doubt. Everyday experience confirms the difference, for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing."

The Court of Appeals for the Tenth Circuit reads *Pointer* too narrowly in declaring, "Failure to exercise the right of cross-examination is no ground for asserting denial of the right of confrontation" (A. 62).

II.

Under the Circumstances of This Case, Failure of Counsel to Cross-Examine the Co-Defendant Witness Was Not Waiver of the Right of Confrontation.

Nor can failure of Mr. Parks to exercise the right of confrontation be regarded as waiver of that constitutional right.

In *Brookhart* v. *Janis*, 384 U.S. 1 (1966), the Court said:

"* * * There is a presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 US 60, 70-71, 86 L ed 680, 699, 62 S Ct 457, and for a waiver to be effective it must be clearly estab-

> lished that there was 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 US 458, 464, 82 L ed 1461, 1466, 58 S Ct 1019, 146 ALR 357."

The Court then analyzed the facts in that case, and was unable to agree with the Supreme Court of Ohio that the Petitioner there, through counsel, intelligently and knowingly waived his right to cross-examine the witness whose testimony was used to convict him, and stated:

> "* * * Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's express desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances. * * *"

If the Court of Appeals had known of the contents of Appendix A to this brief, it is unlikely it would have said:

> "* * * We are not impressed with the contention that the attorney was in a doubtful position because of his previous representation of Woods. * * *" (A. 62)

Instead, it is likely that any Court knowing the circumstances would have examined "* * * the state of petitioner's mind—his understanding and his intention— * * *." (*Brookhart* v. *Janis, supra;* separate opinion of Mr. Justice Harlan, 384 U.S. 9.) The circumstance of the withdrawal of Mr. Parks, the attorney, followed by his fifteen-day subsequent representation of the witness co-defendant Woods in the United States Courts, strongly suggests that

if Petitioner had been aware of the limited or restricted nature of the withdrawal, he would not intentionally have relinquished or abandoned the right of cross-examination of this very material witness. Surely Petitioner should not be charged with intentional relinquishment of the valuable right to have a trial in which he could confront and cross-examine the witnesses against him through *independent* counsel.

When considered in light of the dubious circumstances revealed in the Appendix to this brief and discussed in point III, *post*, the failure of Parks to cross-examine his erstwhile client, Woods, in behalf of Petitioner becomes even less acceptable as valid waiver of Petitioner's constitutional right of confrontation.

III.

Petitioner Was Deprived of Effective Assistance of Counsel.

The Court of Appeals, and, indeed, none of the courts which have considered this case, have faced this issue squarely. Waiver of the constitutional right of confrontation would not have occurred, or might not have occurred (see *Brookhart* v. *Janis, supra*) had Petitioner had the "effective" assistance of Mr. Parks. One of the elements of effectiveness is that of independence. *von Moltke* v. *Gillies*, 332 U.S. 708, at 721 (1948), "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Glasser* v. *United States*, 315 U.S. 60 (1942). In *Glasser*, an attorney named Stewart was retained by Glasser and appointed by the court to represent a co-defendant, Kretske.

Glasser explained to the court that there might be a divergence of interest. One Brantman testified, inculpating Kretske. Stewart secured postponement of cross-examination on the ground that he was not prepared to cross-examine in behalf of Kretske. Three days later, Brantman was recalled. Stewart declined cross-examination. The court pointed out that a colloquy between the court and Stewart before sentence was imposed gave rise to an inference that the decision not to cross-examine was influenced by a desire to protect Kretske, lest Brantman's testimony contain "worse lies". The court stated (at page 73) that a thorough cross-examination was indicated in Glasser's interest, and said:

> "Stewart's failure to undertake such a cross-examination luminates the cross-purposes under which he was laboring."

At page 76, the court continued:

> " • • • The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. • • • "

Glasser's conviction was set aside by the court on the ground that Glasser was denied his right to have the effective assistance of counsel.

Thus, once again, the case at bar is but a shade different from one previously decided by this Court. In *Glasser*, counsel retained by one defendant was appointed for another defendant, and the court noted that there was not that untrammeled assistance of independent counsel commanded by the Sixth Amendment.

"* * * Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. * * * " (*von Moltke* v. *Gillies, supra*)

IV.

Whether or Not the Exceptions to the Hearsay Rule Are Engrafted Upon the Constitutional Right of Confrontation in This Case There Was Not an Adequate Foundation Laid for Introduction of the Transcript of Testimony at the Preliminary Hearing.

Dean Wigmore concedes that the "constitution-makers" "did not attempt to enumerate exceptions" [7] to the requirement of confrontation. Without citation of authority, he continues:

> "The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein." [8]

This Court has not so held. If the Constitutional guarantee of confrontation is an absolute right, the following discussion is unnecessary.

But assuming the validity of Dean Wigmore's thesis, the constitutional standard for hearsay exceptions requires affording the defendant an adequate substitute for confrontation.

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[7] V *Wigmore on Evidence*, §1397 at page 131 (3rd ed., 1940).

[8] *Ibid.*

> "In the establishment of potential trustworthiness, the mere assumption that a situation minimizes the chance of falsification is not sufficient. Judges may properly consider the rationales of the established exceptions, but should not be bound by them. * * * *And a careful determination of necessity will also insure that apparently trustworthy hearsay will not be admitted when the original declarant could be easily produced.*
>
> Finally, the courts must weigh the importance to the defendant of cross-examination of the declarant on the hearsay statement. When the witness is present at trial, the defendant can force him to clarify ambiguities and explain contradictions in his testimony, while the jury is able to observe his demeanor as a factor in assessing credibility. The defendant should not be denied this opportunity unless the issues that would be probed on cross-examination are not generally significant in the trier of the fact's evaluation of the particular evidence." [9]

The state has or should have a greater burden with respect to proving unavailability than a stipulation that the absent witness is in a federal penitentiary in a neighboring state. Cooperation between state and federal law enforcement officials is common knowledge. But not all cooperation between state and federal enforcement officers is for the benefit of those accused of crime. Oklahoma[10] itself has

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[9] "Preserving the Right to Confrontation—a New Approach to Hearsay Evidence in Criminal Trials", 113 U. of Pa. L. Rev. 741, 748 (notes omitted; emphasis supplied) (1965).

[10] Oklahoma had no direct statute with reference to the introduction of testimony of a witness given upon a former trial or preliminary hearing. *Bird* v. *State*, —— Ok. Cr. ——, 362 P.2d 117, 119 (1961).

shown the danger of countenancing less than diligence as a criterion of unavailability. In *Saied* v. *State*, —— Ok. Cr. App. ——, 83 P.2d 605 (1938), the Court said:

> "• • • To lay down the rule that a mere showing that a resident witness is in another state and that no effort or diligence to produce the witness in open court need be shown might enable public prosecutors and others, if it appeared to their interest, to cause witnesses to absent themselves from the jurisdiction of the court to escape further cross-examination. To say that no diligence is required to produce the witness in open court, where it is possible to do so, is not in keeping with the spirit or the letter of the constitutional guaranty that a defendant in a criminal action has a right to be confronted face to face with the witnesses against him." [11]

The majority opinion below states:

> "In our opinion a state is not required to ask a federal court for a discretionary writ and have it denied before the state can use a transcript of the testimony of an out-of-state witness. This is not a case like Motes v. United States, 178 U.S. 458, 471, 20 S.Ct. 993, 44 L.Ed. 1150, where the witness had escaped through the negligence of the government" (A. 61-62).

This is a misapprehension of the teaching of *Motes*, which emphasizes the constitutional right of confrontation by the

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[11] Article II, Section 20 of the Constitution of Oklahoma provides for confrontation of the accused by witnesses against him. Title 22, Section 13, Oklahoma Statutes Annotated, 1951, provides: "In a criminal action the defendant is entitled: • • • (3) • • • to be confronted with the witnesses against him in the presence of the court."

witness and the right to cross-examine when in the presence of the trier of the facts. (In *Motes* the witness whose testimony was produced by transcript at the subsequent trial had been cross-examined on the prior occasion.) In *Motes,* at page 473 of 178 U.S., the first Mr. Justice Harlan quotes from the opinion of Lord Campbell, C. J., in *Reg.* v. *Scaife,* 2 Den. C.C. 281, 285, 286, S.C. 17 Q.B. 238, 5 Cox, C.C. 243, saying:

> " * * * No case has yet gone so far; and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before the jury upon every matter that may be material to his defense. * * * "

Holman v. *Washington,* 364 F.2d 618 (5th Cir., 1966) held that Alabama had made insufficient showing to permit introduction of a transcript of testimony at a former trial based upon the witness' testimony two years before that he lived in South Carolina and a statement that a subpoena had been mailed to the witness in South Carolina. The Court noted that compulsory process is not the only means of securing court attendance (p. 623) and concluded:

> "The constitutional right of confrontation and cross-examination to the extent guaranteed by the Sixth and Fourteenth Amendments cannot be sidestepped because it happens to be convenient for one of the parties. The importance of this right is emphatically demonstrated by the existence of the numerous safeguards designed for its protection."

Only a short while after the Court of Appeals for the Tenth Circuit decided this case, the Court of Appeals for

the Third Circuit reached an opposite result in *Government of the Virgin Islands* v. *Aquino* and *Government of the Virgin Islands* v. *Reyes*, 378 F.2d 540 (1967), in which the court said:

> "• • • It has been widely recognized, however, that in addition to the benefit which a defendant has in testing the reliability of a witness against him by cross-examination, confrontation ordinarily secures a secondary advantage in making it possible for the tribunal before whom the witness appears to judge from his demeanor the credibility of his evidence. This advantage results, not from the confrontation between the witness and the accused, but from the witness' presence before the tribunal. • • •"

and continued, at page 552:

> "• • • The reasonableness of efforts to secure attendance in the Virgin Islands of a witness, whether he is in another state of the Union or in a foreign country, must be judged by the standards of modern air travel and not of the sailing vessel or even the steamship. Where the liberty of a defendant is at stake the government which prosecutes him may not secure the benefit of incriminating testimony against him unless it shows its genuine and bona fide effort to secure the attendance of the witness. An effort which expires at the shoreline of the Virgin Islands cannot be said to have inherently in it the proof of its genuineness and its bona fide character. No effort can be deemed genuine and bona fide which is not reasonable in its extent, and reasonableness must be judged, not by artificial boundaries, but by limitations of time and distance."

To be sure, the United States Government is the prosecutor for the Virgin Islands,[12] but the fundamental protections afforded by the Sixth Amendment to the Constitution of the United States are made applicable to the States, not in part, but in totality, by *Pointer* v. *Texas, supra.*[13] It would avail little to say that the state must permit confrontation, and yet to let the state, itself, define the degree of effort required to satisfy the constitutional mandate.

The very hazard suggested by the Court of Criminal Appeals of Oklahoma in *Saied* v. *State, supra,* that it might be to the interest of public prosecutors to cause witnesses to absent themselves from the jurisdiction of the court to escape further cross-examination might occur, and the constitutional guaranty of confrontation be denied if the casual rule adopted by the Court of Appeals for the Tenth Circuit in this case is permitted to stand. The realistic approach based upon the facts of each case prescribed in the *Government of the Virgin Islands* v. *Aquino, supra,* and *Holman* v. *Washington, supra,* will assure safeguarding the fundamental constitutional right of confrontation, with dual benefits of exclusion of hearsay and an opportunity for the trier of the facts to evaluate the demeanor of the witness.

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[12] In *Government of the Virgin Islands* v. *Lovell,* 378 F.2d 799, 805 (1967), the Court of Appeals for the Third Circuit, exercising supervisory power, applied 18 U.S.C. §3500 to a Virgin Islands criminal proceeding although the legislature of the Virgin Islands had not acted on the subject of production of documents.

[13] "But of course since *Gideon* v. *Wainwright, supra,* it no longer can broadly be said that the Sixth Amendment does not apply to state courts." *Pointer,* at page 406.

Conclusion

The circumstances of this case warrant reversal of the decision of the Court of Appeals for the Tenth Circuit on the ground that the predicate for the admission of the transcript of testimony at the preliminary hearing was insufficient, and that, therefore, the right of confrontation guaranteed by the Sixth Amendment was denied Petitioner by virtue of the admission of that testimony. To sanction the casual approach to unavailability of witnesses adopted by the Court of Appeals for the Tenth Circuit is to permit the state to arrogate to itself the determination of the criterion under which testimony at a preliminary hearing may be introduced at trial. This is not the direction of *Pointer* v. *Texas, supra,* nor of *Douglas* v. *Alabama, supra,* and it is submitted that such a restriction upon the right of confrontation would render the right meaningless.

While no lower federal court has passed upon the question of denial of assistance of counsel in this case, the facts set forth in Appendix A so cloud the representation of Petitioner by Mr. Parks that, at the very least, the Court should remand the case for hearing as to all of the circumstances surrounding the withdrawal of Mr. Parks, and his failure to examine Woods at the preliminary hearing.

Respectfully submitted,

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